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EUR/CE - MR. B. FLATIN

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FM SECSTATE WASHDC

TO AMEMBASSY BERN

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E.O. 11652: N/A

TAGS: PFOR, CFED, SZ (JUDICIAL ASSISTANCE TREATY)

SUBJECT: SWISS TREATY AND IMPLEMENTING SWISS LEGISLATION.

REF: (A) BERN 768, 584; (B) STATE 033248.

1. AS EMBASSY PREVIOUSLY INFORMED, AMERICAN DELEGATION HAD BEEN LED TO BELIEVE THAT ALL SWISS CANTONS PROVIDE FOR EITHER AN OATH OR AFFIRMATION IN CONNECTION WITH THE TAKING OF TESTIMONY. OUR DELEGATION IS MUCH CONCERNED BY ADVICE THAT SOME CANTONS, INCLUDING BERN AND ZURICH, DO NOT HAVE PROVISIONS REQUIRING EITHER AN OATH OR AFFIRMATION.

2. IN THIS CONNECTION WE NOTE THAT ARTICLE 26, PARA 2, OF THE IMPLEMENTING LEGISLATION, PROVIDES THAT WHERE THE LAW OF THE EXECUTING AUTHORITY (CANTON) DOES NOT PROVIDE FOR OATH OR AFFIRMATION AND AFFIRMING IN EITHER FORM IS REFUSED, NO COMPULSION MAY BE USED AND NO SANCTIONS IMPOSED. THIS
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ARTICLE OF THE LEGISLATION IS CLEARLY INCONSISTENT WITH

ARTICLE 12, PARA 1 OF THE TREATY, WHICH PROVIDES THAT THE REQUESTED STATE SHALL COMPLY WITH A REQUEST THAT TESTIMONY BE UNDER OATH OR AFFIRMATION "EVEN IN THE EVENT NO PROVISIONS THEREFOR EXIST IN ITS PROCEDURAL LAW."

3. THE LACK OF A PROVISION FOR OATH OR AFFIRMATION WOULD CREATE MOST SEVERE DIFFICULTIES WITH RESPECT TO EVIDENTARY USE OF INFORMATION OBTAINED FROM SWITZERLAND. SEE,

FOR EXAMPLE, ARTICLE 18, PARA 1; ARTICLE 20, PARA 1; AND ARTICLE 12, PARA 3.

4. IN VIEW OF THE EXTREME IMPORTANCE OF THIS MATTER TO THE UNITED STATES, IT IS REQUESTED THAT APPROPRIATE SWISS AUTHORITIES BE INFORMED OF OUR CONCERN AND ASKED HOW EVIDENTARY MATERIALS (PRIMARILY TESTIMONY UNDER OATH OR AFFIRMATION) WOULD BE OBTAINED UNDER THE TREATY. WOULD ARTICLE 38, PARA 3, WHICH PROVIDES THAT "THE PROVISIONS OF THIS TREATY SHALL TAKE PRECEDENCE OVER ANY INCONSISTENT PROVISIONS OF THE MUNICIPAL LAWS IN THE CONTRACTING STATES" BE OF ASSISTANCE IN RESOLVING THIS MATTER?

5. (BEGIN FYI) U.S. TEAM OF VIEW THAT SWISS ERRED DURING NEGOTIATIONS RE AVAILABILITY OF OATH OR AFFIRMATION UNDER CANTONAL LAW. ERROR SHOULD HAVE BEEN CORRECTED BY ENABLING LEGISLATION. USG IS NOW IN POSITION OF ATTEMPTING TO GET SWISS TO CORRECT ERROR, COMPOUNDED BY DRAFTING OF IMPLEMENTING LEGISLATION, WHICH ONLY THEY CAN DO AND PROBABLY THROUGH A RE-INTERPRETATION OF IMPLEMENTING LEGISLATION OR TREATY OR BOTH. MATTER MAY REQUIRE EXCHANGE OF NOTES. (END FYI)

6. EMBASSY SHOULD DISCUSS MATTER URGENTLY WITH APPROPRIATE SWISS OFFICIALS AND REPORT SWISS AND EMBASSY VIEWS. KISSINGER

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